No. 06-1336

FILED
MAY 07 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the
Supreme Court of the United States

DAVID ALAN COOPER,
Petitioner,

v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

DAVID R. CORDELL
Counsel of Record
JASON S. TAYLOR
CONNER & WINTERS, LLP
4000 ONE WILLIAMS CENTER
TULSA, OKLAHOMA 74172-1048
(918) 586-8995

Counsel for Respondent

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether the District Court properly denied Petitioner's Motion for Summary Judgment and granted American Airline, Inc.'s ("American") Motion for Summary Judgment.

2. Whether the Tenth Circuit properly affirmed the District Court's ruling that the dispute between Petitioner and a co-worker did not constitute racial discrimination within the meaning of 42 U.S.C.A. § 2000e-2(a)(1).

3. Whether the Tenth Circuit properly affirmed the District Court's ruling that American's handling of the dispute between Petitioner and a co-worker did not constitute an adverse employment action.

4. Whether the Tenth Circuit properly affirmed the District Court's ruling that the dispute between Petitioner and a co-worker was not a violation of 42 U.S.C.A. § 1981.

CORPORATE DISCLOSURE STATEMENT

The parent corporation of American Airlines, Inc. is AMR Corporation. AMR Corporation owns 100% of American Airlines, Inc.'s stock. No public company owns 10% or more of AMR Corporation's stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 4

I. The Issues Presented in the Petition Are Not Sufficiently Important to Warrant This Court's Attention. 4

II. The Petition Seeks to Dispute the Factual Findings Below and the Application of Properly Stated Rules of Law to Those Facts. 5

III. The Tenth Circuit's Decision is Not in Conflict With Other Circuits. 8

IV. The Tenth Circuit's Decision Is Consistent With This Court's Precedent. 10

CONCLUSION 12

TABLE OF CITED AUTHORITIES

Page

Cases

Bell v. Ohio State Univ.,
351 F.3d 240, 253 (6th Cir. 2003) 9

Braxton v. U.S.,
500 U.S. 344, 347 (1991) 8

Domino's Pizza, Inc. v. McDonald,
546 U.S. 470 (U.S. 2006) 11

English v. Colo. Dept of Corr.,
248 F.3d 1002, 1008 (10th Cir. 2001) 4

General Talking Pictures, Corp. v. Western Electric Co., et al., 304 U.S. 546 (1938) 5, 6

Gratz v. Bollinger, 539 U.S. 244 (2003) 11

Hampton v. Dillard Dep't Stores, Inc.,
247 F. 3d 1091, 1102 (10th Cir. 2001) 9

Herrera v. Lufkin Industries,
474 F.3d 675 (10th Cir. 2007) 7, 8

Intern. Ass'n of Mach. v. N.W. Airlines,
673 F.2d 700 (3rd Cir. 1992) 9, 10

Kennedy v. Silas Mason Co.,
334 U.S. 249, 256 (1948) 6

McDonnell Douglass Corp v. Green,
411 U.S. 792 (1973) 4, 9

Pamintuan v. Nanticoke Memorial Hosp.,
192 F.3d 378, 385 (3rd Cir. 1999) 9

United States v. Johnston,
268 U.S. 220, 227 (1925) 5, 6

United Transp. Un. v. Grand Truck West R. Co.,
901 F.2d 489 (6th Cir. 1990) 9

Virginian Ry. Co. v. System Federation No. 40, et al.,
300 U.S. 515 (1937) 10, 11

Statutes

42 U.S.C. § 1981 3
42 U.S.C. §§ 2000e-17 3

Other Authorities

Railway Labor Act, 45 U.S.C.A. § 151, *et seq.* 10
Title VII of the Civil Rights Act of 1964 3

INTRODUCTION

The Court should deny the Petition for several reasons. First, the issues presented in the Petition are not sufficiently important to warrant this Court's attention. Second, the Petition merely seeks review for purposes of disputing the factual findings below and the application of properly stated rules of law to those facts. Third, there is no circuit conflict on the questions asserted in the Petition. Fourth, the Tenth Circuit's decision is entirely consonant with the decisions of this Court. As such, there is no "compelling reason" for the Court to exercise its considerable discretion in granting the Petition.

STATEMENT OF THE CASE

1. (a). Petitioner, an African-American male, began his career with American on or about March 16, 1986 as a member of the fleet service crew in Tulsa. Despite being a member of the Transport Workers Union of America, AFL-CIO, Local 514 ("TWU"), Petitioner has actively supported the rival Aircraft Mechanics Fraternal Association ("AMFA") for several years. *See*, Appendix B, p. 9a.

In 2003 AMFA attempted to raise sufficient support among the mechanics in Tulsa to force an election to determine whether TWU or AMFA would represent the mechanics in labor relations with American. In connection with AMFA's efforts to force an election, Petitioner distributed flyers to American employees at various times with permission from American. *See*, Petition, Appendix B, p. 9a-10a.

Petitioner alleges he was harassed on September 9, 2003 when then TWU President Randy McDonald ("McDonald"),

an overhaul mechanic and a white male, confronted Petitioner as Petitioner was handing out AMFA flyers. *Id.* According to Petitioner, McDonald allegedly:

- attempted to wrestle away the AMFA literature from Petitioner
- "jumped up in my (Petitioner's) face" and pointed at him and screamed something regarding Petitioner supposedly "destroying" TWU membership;
- pressed his "lower pelvic area" against Petitioner's leg which Petitioner described as "pressing and bumping and humping" against his body; and
- made unintelligible "African gibberish" noises.
- McDonald did not use any racial slurs during the incident.

See, Petition, Appendix B, p. 9a-10a.

During the confrontation, two of American's most senior managers in Tulsa, along with American security officers, personally intervened in the incident to end the confrontation. Thereafter, American initiated an investigation. Following its investigation, American disciplined McDonald by giving him a "first-step advisory" for his conduct on September 9, 2003. *Id.*

Following the incident, Petitioner returned to his job at American where he is still currently employed. American did not discipline Petitioner in any manner whatsoever. Further, McDonald never confronted Petitioner again. *See,* Petition, Appendix B, p. 10a.

1.(b). In Response to Petitioner's blatant mischaracterization of the facts of this case in his *Statement of Facts*, American feels compelled to dispel certain of the more egregious examples of false and inflammatory

statements contained therein by referring this Court to the undisputed record of this case. First, Petitioner repeatedly asserts throughout his Petition that he was subjected to "racial slurs" during the incident in question. This is a false statement which is contrary to Plaintiff's sworn testimony and not supported by any evidence. *See*, Petition, Appendix B, p. 12a. Moreover, the District Court and the Tenth Circuit noted that Petitioner's claims of racial animosity in this case are "thin at best." *See*, Appendix B, p. 14a. Second, Petitioner's repeated claim that American's senior management condoned or encouraged the confrontation at issue in this case in any way is without any evidentiary support. Petitioner himself testified to the efforts made by two of American's most senior management officials on the Base who intervened to stop the dispute. *See*, Petition, appendix B, p. 12a. Third, Petitioner's false claim that American did not discipline the co-worker who confronted Petitioner is without support insofar as American formally disciplined him by issuing a "First-Step Advisory." *Id.*

2. Petitioner filed suit asserting a disparate treatment claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-17 and discrimination in violation of 42 U.S.C. § 1981. Petitioner premised his Title VII claim on his view that American did not sufficiently discipline McDonald in connection with the incident with McDonald. Additionally, Petitioner alleged American discriminated against him in violation of § 1981 by allegedly denying him an equal right to contract for the union representation of his choice.

3. The District Court granted American's Motion for Summary judgment and denied Petitioner's Motion for Summary Judgment. *See*, Petition, Appendix B. With respect to Petitioner's Title VII claims (American also moved for summary judgment on Petitioner's un-pled Title VII hostile

work environment claim) and § 1981 claim, the District Court concluded that Petitioner had not met his burden to establish a *prima facie* case under the familiar burden shifting analysis established by *McDonnell Douglass Corp v. Green*, 411 U.S. 792 (1973). *See, English v. Colo. Dept of Corr.*, 248 F.3d 1002, 1008 (10th Cir. 2001) (applying *McDonnell Douglas* to both Title VII and § 1981 claims). Specifically, the District Court held that Petitioner did not allege a legally cognizable adverse employment action noting that Petitioner's claim "borders on frivolous." *See*, Petition, Appendix B, p. 13. Further, the District Court found that Petitioner's allegations of racially motivated conduct were "thin at best." *See*, Petition, Appendix B, p. 14. The District Court also found that American acted reasonable in responding to the incident. *See*, Petition, Appendix B, p. 14a. The Tenth Circuit affirmed on essentially the same grounds. *See*, Petition, Appendix A.

REASONS FOR DENYING THE PETITION

I. The Issues Presented in the Petition Are Not Sufficiently Important to Warrant This Court's Attention.

The only real questions Petitioner raises in his Petition turn on the particular facts of this case alone and are of interest only to the parties to it. The Petition does not set forth any of the traditional grounds for this Court to exercise its discretion to grant certiorari. The Petition does not establish that the Tenth Circuit's decision is in conflict with the other Circuits or a decision of this Court. The Petition does not establish that the Tenth Circuit has decided an important question of federal law that has not, but should be, settled by this Court. The Petition merely contends that the

Tenth Circuit improvidently affirmed the District Court's grant of summary judgment in favor of American.

In essence, Petitioner asks this Court to make a third review of the undisputed record to see if it can find what two previous courts have been unable to find – evidence of unlawful discrimination. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925). Moreover, in the realm of factual review and analysis, the rulings of the courts below are treated with and entitled to great weight. *General Talking Pictures, Corp. v. Western Electric Co, et al,* 304 U.S. 546 (1938) (Concurrent findings of the District Court and the Court of Appeals on questions of fact are not disturbed unless plainly without support or evidence). In the present case, Petitioner raises questions turning entirely on the facts of this case, already resolved twice in favor of American, and without any impact outside the boundaries of this case. Therefore, certiorari should be denied.

II. The Petition Seeks to Dispute the Factual Findings Below and the Application of Properly Stated Rules of Law to Those Facts.

The Honorable Judge James Payne of the District Court granted summary judgment against Petitioner and in favor of American based upon on a host of undisputed facts. *See*, Petition, Appendix B. In support, Judge Payne rendered a well reasoned ten page Order which applied properly stated rules of law to the undisputed facts of this case. *Id.* Tellingly, in thoroughly analyzing Petitioner's claims the opinion remarks how such claim(s) "borders on frivolous" are "thin at best" and "are nothing short of confusing." *See*,

Petition, Appendix B, pp. 13a, 14a, and 16a, respectively. Likewise, the Tenth Circuit affirmed this decision based on the undisputed record before it. *See*, Petition, Appendix A. With his Petition, Petitioner makes his third attempt to establish the facts of this case in his favor.

Petitioner disputes the factual findings of the District Court and the undisputed record before the Tenth Circuit by introducing unsupported factual allegations in his *Statement of the Case*. *See*, Petition, pp. 2-11. In addition, Petitioner argues that the Tenth Circuit did not properly apply precedents from this Court and the Tenth Circuit to those facts. *See*, Petition, pp. 2-15. Notably, Petitioner does not allege the Tenth Circuit failed to apply the correct law; Petitioner merely disputes the Tenth Circuit's application of such law.

Petitioner's attempt to re-argue the merits of his case before this Court as a basis for certiorari is a practice previously rejected by this Court. *See*, *Johnston* and *General Talking Pictures*, *supra*. This Court's traditional refusal to grant certiorari on such a basis is based, at least in part, on its recognition that a district court is the appropriate forum to determine the facts of a particular case:

> The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine.

Kennedy v. Silas Mason Co., 334 U.S. 249, 256 (1948) (rationale for denying certiorari).

Petitioner seeks a factual review of this matter by this Court by asserting that the Tenth Circuit's recent decision in *Herrera v. Lufkin Industries*, 474 F.3d 675 (10th Cir. 2007) "causes Mr. Cooper to question the District Court's grant of summary judgment (with respect to Petitioner's un-pled hostile work environment claim[1]) in favor of American". *See*, Petition, p. 13. However, the *Herrera* decision does not overrule or modify any of the standards utilized by the Tenth Circuit in this case. Petitioner is merely asking this Court to re-examine the facts of this case in hopes of it reaching a different conclusion than the District Court or the Tenth Circuit.

In *Herrera*, the Tenth Circuit reversed the district court's grant of summary judgment in a hostile work environment claim where, unlike the instant case, the plaintiff presented evidence of numerous incidents of racially derogatory conduct directed toward plaintiff. *Herrera*, 474 F.3d at 680-683. In so ruling, the *Herrera* court invoked the well settled rule of law that a plaintiff in a hostile work environment claim must establish that "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently *severe or pervasive to alter the terms and conditions of the victim's employment* and create an abusive working environment...and the victim was targeted for harassment because of [his]...race or national origin." *Herrera*, 474 F 3d at 680. Further, to make a showing of a persuasively hostile work environment

---

[1] Petitioner's Complaint does not contain a cause of action for Title VII hostile work environment. *See*, Complaint. In an abundance of caution, American addressed this claim in moving for summary judgment. The District Court considered the evidence and applied the appropriate standard in determining Petitioner did not establish a *prima facie* case. *See*, Petition, Appendix B, pp. 14a-15a.

plaintiff must make a showing of "*a steady barrage of opprobrious racial comments*." *Id.* (Emphasis added).

With respect to this matter, the Tenth Circuit, in affirming the District Court's rejection of the hostile work environment claim, noted the District Court's finding that Petitioner's allegations of racially motivated harassment "are thin at best". *See*, Petition, Appendix B, p. 14a. Further, the Tenth Circuit affirmed the District Court's determination, using the same standard as later applied in *Herrera*, that the alleged harassment did not affect "*a term or condition of Mr. Cooper's employment* and did not constitute the '*steady barrage of opprobrious racial comment*' as would offend Title VII." *Id.* (Emphasis added). Accordingly, the District Court and the Tenth Circuit examined the facts of this case and employed the same standards set forth in *Herrera* to determine that Plaintiff did not establish a *prima facie* case of hostile work environment discrimination. Now, Petitioner wants a third court to apply the same standard to these facts in hopes of obtaining a different result. This is not an appropriate basis for certiorari.

III. The Tenth Circuit's Decision is Not in Conflict With Other Circuits.

The principal purpose for which this Court uses certiorari jurisdiction is to resolve conflicts among the Circuit Courts of Appeals concerning the meaning of provisions of federal law. *Braxton v. U.S.*, 500 U.S. 344, 347 (1991). Not surprisingly, Petitioner invokes this common rationale for certiorari by falsely claiming the Tenth Circuit's decision with respect to Petitioner's § 1981 claim is in conflict with the Third and Sixth Circuits. *See*, Petition, pp. 15-16. However, this basis for granting certiorari has no application to this case because

there is no real conflict among the Circuits resulting from the Tenth Circuit's decision.

In the instant case, the Tenth Circuit applied *Hampton v. Dillard Dep't Stores, Inc.*, 247 F. 3d 1091, 1102 (10th Cir. 2001), which utilizes the familiar burden shifting analysis established by this Court in *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792 (1973), to determine whether Petitioner established a *prima facie* case under §1981. *See*, Petition Appendix A, p. 6A. Notably, the Third and Sixth Circuits employ the same *McDonnell-Douglass* burden-shifting analysis as adopted in the Tenth Circuit. *See*, *Pamintuan v. Nanticoke Memorial Hosp.*, 192 F.3d 378, 385 (3rd Cir. 1999) ("We analyze Section 1981 claims under the familiar *McDonnell-Douglass* shifting burden framework used in Title VII cases."); and *Bell v. Ohio State Univ.*, 351 F.3d 240, 253 (6th Cir. 2003)("... a claim of discrimination under Section 1981 ... requires evidence sufficient to make out a prima facie case of discrimination under *McDonnell Douglass*..."). Thus, there is no real conflict in the stated rule of law as the Third, Sixth and Tenth Circuits are all employing the same standard set forth by this Court.

In the Petition, Petitioner mistakenly alleges that the Tenth Circuit's decision conflicts with the Third Circuit's decision in *Intern. Ass'n of Mach. v. N.W. Airlines*, 673 F.2d 700 (3rd Cir. 1992) and the Sixth Circuit's decision in *United Transp. Un. v. Grand Truck West R. Co.*, 901 F.2d 489 (6th Cir. 1990). However, these Third Circuit and Sixth Circuit opinions are inapposite to the issues that were addressed by the Tenth Circuit in this matter. Neither of these cases addresses the issue confronted by the Tenth Circuit in this case, *i.e.*, whether Petitioner properly established a *prima facie* case of discrimination under Title VII or § 1981. Rather, the Third and Sixth Circuit decisions cited by

Petitioner address very narrow collective bargaining issues under the Railway Labor Act, 45 U.S.C.A. § 151, *et seq.* ("RLA"). *See*, *N.W. Airlines*, 673 F.2d at 703 (Third Circuit considered whether employer's disciplinary action regarding union activities constitutes a "minor" dispute under the RLA); and *United Transportation Union*, 901 F.2d at 490 (Sixth Circuit considered employer's collective bargaining obligations under the RLA). Indeed, neither of the plaintiffs in these cases asserted claims under Title VII or § 1981. *Id.* As such, Petitioner has wholly failed to demonstrate that any conflict exists among the Circuits regarding this well settled rule of law.

IV. The Tenth Circuit's Decision Is Consistent With This Court's Precedent.

The Petitioner asserts in the Petition that the Tenth Circuit's decision is inconsistent with this Court's precedent. *See*, Petition, pp. 14-15. There is no basis for this claim. As set forth above, the Tenth Circuit applied well settled precedent emanating from this Court to determine whether Petitioner properly established a *prima facie* case of discrimination under Title VII or § 1981. The fact that the Tenth Circuit justifiably determined that Petitioner did not meet this well established standard is the real source of Petitioner's dispute.

In the Petition, Petitioner incorrectly alleges that the Tenth Circuit's decision is in conflict with this Court's holding in *Virginian Ry. Co. v. System Federation No. 40, et al.*, 300 U.S. 515 (1937). *See*, Petition, pp. 14-15. This Court's decision in *Virginian* is distinct and remote from the instant dispute. In *Virginian*, this Court addressed questions as to the constitutionality of certain provisions of the RLA and as to the nature and extent of the relief which courts are authorized to

give under the RLA. *Virginian*, 300 U.S. at 539. Such issues are not in dispute in this lawsuit. Moreover, the *Virginian* Court did not address the standards for a plaintiff to establish a *prima facie* case of discrimination under Title VII or § 1981.

Petitioner also claims that Tenth Circuit's decision is in conflict with *Gratz v. Bollinger*, 539 U.S. 244 (2003). Tellingly, the Petition makes no attempt to articulate how *Gratz* conflicts with the Tenth Circuit's decision.[2] Regardless, the *Gratz* decision does not relate to the issues before the Tenth Circuit in this matter. The *Gratz* Court confronted the constitutionality of the University of Michigan's admission procedure. *Id.* at 244-245. As part of its holding the Court determined that the policy violated § 1981. The Court addressed the § 1981 claims in a footnote observing a "contract for educational services is a 'contract' for purposes of §1981 and...purposeful discrimination that violates the Equal Protection Clause...will also violate §1981." *Id.* at footnote 23.

Petitioner also claims that Tenth Circuit's decision is in conflict with *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (U.S. 2006). The *Domino's* Court considered the issue of standing to assert a §1981 claim by holding that a plaintiff cannot state a § 1981 claim unless he has, or would have, rights under existing contract that he "wishes to make and enforce." *Id.* at 1251-1252. Notably, the Tenth Circuit did not address nor base its decision on whether or not Petitioner had standing to assert a § 1981 claim. The Tenth Circuit

---

[2] The Petition attributes a quote to the *Gratz* Court which actually derives from the Court's opinion in *Domino's Pizza*. American will address this issue below.

merely concluded Petitioner failed to establish a *prima facie* case under § 1981. Thus, there is no conflict between the Tenth Circuit's decision and the Court's holding the *Domino's* case.

Petitioner's ill-conceived citations to RLA and § 1981 decisions by this and other courts that do not relate to issues confronted by the Tenth Circuit in this matter wholly fail to support Petitioner's Petition. Such decisions are not impacted by this case nor were the rules of law stated therein necessary for the determination of Petitioner's claims. Indeed, Petitioner has not cited one single decision that is impacted in any way by the Tenth Circuit's decision in this case. Thus, Petitioner has failed to establish that the Court must exercise certiorari jurisdiction to resolve a decision which is inconsistent with this Court's precedent.

CONCLUSION

For these reasons, the Court should deny the Petition.

Respectfully submitted,

David R. Cordell
Jason S. Taylor
Conner & Winters, LLP
4000 One Williams Center
Tulsa, Oklahoma 74172-1048
(918) 586-8995

Attorneys for Respondent
American Airlines, Inc.